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Nos. 95-1355, 95-8134 and 95-8147

In the Supreme Court of the United States

OCTOBER TERM, 1995

KERRY CHAPLIN, PETITIONER

v.

UNITED STATES OF AMERICA

TERRY RATLIFF, SR., PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM THOMAS LAWRENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' challenge to the validity of a state wiretap on the ground that the court was bound by the ruling of a prior panel that had rejected the same legal challenge to the validity of the wiretap.

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Cannon v. *United States Dep't of Justice, U.S. Parole Commission*, 973 F.2d 1190 (5th Cir. 1992), cert denied, 508 U.S. 915 (1993)	5
Ciba-Geigy Corp. v. *Bolar Pharmaceutical Co.*, 747 F.2d 844 (3d Cir. 1984), cert. denied, 471 U.S. 1137 (1985)	5
Hernandez-Uribe v. *United States*, 515 F.2d 20 (8th Cir. 1975), cert. denied, 423 U.S. 1057 (1976)	6
Jones-Hamilton Co. v. *Beazer Materials & Services, Inc.*, 973 F.2d 688 (9th Cir. 1992)	5
Pena-Cabanillas v. *United States*, 394 F.2d 785 (9th Cir. 1968)	6
Smith, In re, 10 F.3d 723 (10th Cir. 1993), cert. denied, 115 S. Ct. 53 (1994)	5
Snell v. *Lockhart*, 14 F.3d 1289 (8th Cir.), cert. denied, 115 S. Ct. 419 (1994)	5
United States v. *Colacurcio*, 514 F.2d 1 (9th Cir. 1975)	6
United States v. *Harnage*, 976 F.2d 633 (11th Cir. 1992)	6
United States v. *Hogan*, 986 F.2d 1364 (11th Cir. 1993)	5
United States v. *Killion*, 7 F.3d 927 (10th Cir. 1993), cert. denied, 114 S. Ct. 1106 (1994)	5
United States v. *Ortiz-Granados*, 12 F.3d 39 (5th Cir. 1994)	5

Cases—Continued: Page

United States v. *Pelullo*, 14 F.3d 881 (3d Cir. 1994) 6
United States v. *Rosenberger*, 872 F.2d 240 (9th Cir. 1989) 6
United States v. *Storm*, 36 F.3d 1289 (5th Cir. 1994), cert. denied, 115 S. Ct. 1798 (1995) 5
United States v. *Tavarez*, 40 F.3d 1136 (10th Cir. 1994) 4, 5, 6

Statutes:

21 U.S.C. 841(a)(1) 2
21 U.S.C. 843(b) 2
21 U.S.C. 846 2
Oklahoma Security of Communications Act, Okla. Stat. Ann. tit. 13, §§ 176.1-176.14 (West 1994)..... 3

Miscellaneous:

1 B James W. Moore, et al., *Moore's Federal Practice* (2d ed. 1995) 5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a)[1] is reported at 69 F.3d 419.

[1] "Pet. App." refers to the appendix filed in No. 95-1355.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1995. A petition for rehearing was denied on December 1, 1995. Pet. App. 41a-42a. The petition for a writ of certiorari in No. 95-1355 was filed on February 23, 1996. The petition in No. 95-8134 was filed on March 4, 1996, and is therefore out of time under this Court's Rule 13.1. The petition in No. 95-8147 was filed on February 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, petitioners were convicted of conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Petitioner Chaplin was also convicted of using a communications facility in furtherance of a drug trafficking offense, in violation of 21 U.S.C. 843(b); and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Chaplin was sentenced to 151 months' imprisonment, to be followed by a five-year term of supervised release, and fined $5,000. Petitioner Ratliff was sentenced to 120 months' imprisonment, to be followed by a five-year term of supervised release, and fined $1,000. Petitioner Lawrence was sentenced to 262 months' imprisonment, to be followed by a five-year term of supervised release, and fined $3,000. The court of appeals affirmed. Pet. App. 1a-37a.

1. Petitioners and Milton Edwards purchased cocaine from Balbino Tavarez in Houston, Texas, for resale in Atoka, Oklahoma. Jerry Grist transported the cocaine from Houston to Tulsa where he distri-

buted the cocaine to petitioners and Edwards. Pet. App. 3a-4a.

In April 1993, an Oklahoma state court authorized the interception of telephone communications from two telephone numbers used by Grist in Atoka County, Oklahoma. Pursuant to the wiretap order, state agents intercepted a telephone conversation between Grist and Tavarez that revealed that Grist planned to travel to Houston to purchase cocaine from Tavarez. Agents arrested Grist near Atoka as he was returning from Houston, and found four kilograms of cocaine in his possession. Petitioners Lawrence and Chaplin had contributed money toward the purchase of that cocaine. Pet. App. 3a-4a.

Following his arrest, Grist began cooperating with the government. He made several calls to petitioner Ratliff informing him that a "friend" (DEA agent Joe Leszczynski) would be visiting Tulsa for the purpose of distributing cocaine. Thereafter, Leszczynski contacted Ratliff and Chaplin concerning cocaine purchases. Grist's father also began cooperating with the government, and agents recorded calls he made to Chaplin and Ratliff concerning planned purchases of cocaine. Chaplin purchased one kilogram of cocaine from Grist's father and was arrested. Grist's father also agreed to provide two kilograms of cocaine to Edwards and Lawrence on credit. Edwards and Lawrence were arrested after Lawrence took possession of the cocaine. Pet. App. 4a-6a.

2. Following their indictment, petitioners moved to suppress evidence obtained pursuant to the April 1993 wiretap on Grist's phones on the ground that the "interception" of those communications did not occur "within the territorial jurisdiction * * * of the district attorney requesting the order" as required by

the Oklahoma Security of Communications Act, Okla. Stat. Ann. tit. 13, §§ 176.1-176.14 (West. 1994). The district court rejected that contention. It held that, under the Oklahoma wiretap statute, an "interception" occurs where the agents monitor the call, not where the phones are located. Because the agents monitored the calls within the jurisdiction of the district attorney who applied for the wiretap, the court concluded that the district attorney had authority to apply for the wiretap. Pet. App. 38a-40a.

3. The court of appeals affirmed. Pet. App. 1a-37a. The court rejected petitioner's challenge to the wiretap order on the authority of its decision in *United States* v. *Tavarez*, 40 F.3d 1136 (10th Cir. 1994). In that case, the Tenth Circuit held that, under the Oklahoma wiretap statute, an "interception" occurs "in the place where the contents of the communication are first heard by law enforcement officials." *Id.* at 1137. While petitioners urged the court of appeals to reconsider its ruling in *Tavarez*, the court declined to do so. The court held that "[w]e are bound by our authoritative construction of the Oklahoma wiretap statute in *Tavarez* absent an intervening Supreme Court precedent or en banc reconsideration." Pet. App. 10a.

ARGUMENT

1. Petitioners argue (95-1355 Pet. 6-8; 95-8134 Pet. 6-9; 95-8147 Pet. 7-11) that, because they were not parties in *Tavarez*, the court of appeals erred in applying the doctrine of collateral estoppel to preclude them from relitigating the validity of the wiretap upheld in *Tavarez*. That contention is without merit.

In refusing to reconsider its decision in *Tavarez*, the court of appeals in this case applied the doctrine of stare decisis, not the doctrine of collateral estoppel. See Pet. App. 8a-10a. Under the doctrine of stare decisis, an appellate panel is generally bound by the holding of a prior panel, absent an intervening contrary decision by the en banc court, the Supreme Court, or, when the issue is one of state law, the courts of the State. *United States* v. *Storm*, 36 F.3d 1289, 1297 (5th Cir. 1994), cert. denied, 115 S. Ct. 1798 (1995); *Snell* v. *Lockhart*, 14 F.3d 1289, 1305 (8th Cir.), cert. denied, 115 S. Ct. 419 (1994); *United States* v. *Ortiz-Granados*, 12 F.3d 39, 41 (5th Cir. 1994); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S. Ct. 53 (1994); *United States* v. *Killion*, 7 F.3d 927, 930-931 (10th Cir. 1993), cert. denied, 114 S. Ct. 1106 (1994); *United States* v. *Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993); *Cannon* v. *United States Dep't of Justice, U.S. Parole Comm'n*, 973 F.2d 1190, 1196 (5th Cir. 1992), cert. denied, 508 U.S. 915 (1993); *Jones-Hamilton Co.* v. *Beazer Materials & Services, Inc.*, 973 F.2d 688, 696 n.4 (9th Cir. 1992); *Ciba-Geigy Corp.* v. *Bolar Pharmaceutical Co.*, 747 F.2d 844, 856 n.10 (3d Cir. 1984), cert. denied, 471 U.S. 1137 (1985). Unlike the doctrine of collateral estoppel, which precludes relitigation of factual issues and applies only to parties to the prior proceeding (and those in privity with them), the doctrine of stare decisis precludes reconsideration of legal issues and applies to all persons, regardless of whether they were parties to the prior proceeding. 1B James W. Moore, *et. al.*, *Moore's Federal Practice* ¶ 0.401 (2d ed. 1995).

The court of appeals correctly applied the doctrine of stare decisis in this case. In *Tavarez*, the Tenth Circuit held that the Oklahoma wiretap statute

authorizes a district attorney to apply for a wiretap order when the conversations will be monitored within the district attorney's jurisdiction. 40 F.3d at 1138. The *Tavarez* court expressly rejected the defendant's argument that the Oklahoma statute permits a district attorney to apply for a wiretap order only when the tapped phones are within the district attorney's jurisdiction. *Ibid.* Petitioners in this case did not seek to relitigate any of the factual issues decided in *Tavarez*. Instead, they raised the same legal contention raised by the defendant in *Tavarez*—that the Oklahoma wiretap statute authorizes a district attorney to request a wiretap only when the tapped phones are within his jurisdiction. Pet. App. 9a. Because the *Tavarez* decision had authoritatively resolved that legal issue, and there was no intervening en banc, Supreme Court, or state court decision to the contrary, the court of appeals correctly rejected petitioners' challenge to the wiretap at issue in this case on the authority of its decision in *Tavarez*.

2. Petitioners alternatively contend (95-1355 Pet. 8-10; 95-8134 Pet. 9-12) that the Court should grant review to resolve the conflict in the circuits concerning whether collateral estoppel may be applied against a criminal defendant. Compare *United States* v. *Pelullo*, 14 F.3d 881, 889-896 (3d Cir. 1994) (collateral estoppel may not be applied against a criminal defendant); *United States* v. *Harnage*, 976 F.2d 633, 635 (11th Cir. 1992) (same) with *United States* v. *Rosenberger*, 872 F.2d 240, 241-242 (9th Cir. 1989) (collateral estoppel may be applied against a criminal defendant); *Hernandez-Uribe* v. *United States*, 515 F.2d 20, 21-22 (8th Cir. 1975) (same), cert. denied, 423 U.S. 1057 (1976); *United States* v. *Colacurcio*, 514 F.2d

1, 6-7 (9th Cir. 1975) (same); *Pena-Cabanillas* v. *United States*, 394 F.2d 785, 786-788 (9th Cir. 1968) (same). As discussed above, however, the court of appeals in this case applied the doctrine of stare decisis, not the doctrine of collateral estoppel. This case therefore does not present an occasion to resolve the conflict in the circuits identified by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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